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No. 523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

HOLLAND-AMERICA LINE, *Petitioner,*

v.

TEXPORTS STEVEDORING COMPANY, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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APPENDIX A

APPENDIX B

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitution Provision Involved	2
Statement of the Case	3
Reasons For Granting the Writ	6
1. Conflict	6
2. Importance	9
3. Error In Decision Below	12
Conclusion	14
Appendix A: Opinions and judgments below	
Opinion of Court of Civil Appeals	15
Judgment of Court of Civil Appeals	28
Order of Court of Civil Appeals Overruling Motion for Rehearing	30
Order of Supreme Court of Texas Refusing Application for Writ of Error	32
Order of Supreme Court of Texas overruling Motion for Rehearing	34
Judgment of District Court	35
Appendix B: Raising Federal Question	
Defendant's Fourth Amended Original Answer and Third Party Action	65

CITATIONS

Cases

American Export Lines, Inc. v. Reyel, 266 F. 2d 82 (4th Cir. 1959)	13
American President Lines, Ltd., v. Marine Terminals Corp., 234 F. 2d 753 (9th Cir. 1956), certiorari denied 352 U.S. 926 (1956)	14

PAGE

Calmer Steamship Corp. v. Nacirema Operating Co., 266 F. 2d 79 (4th Cir. 1959) certiorari denied 361 U.S. 816 (1959) 13
Crumady v. Joachim Hendrik Fisser, 358 U.S. 423 (1959).... 9, 13
Drago v. A/S Inger 194 F. Supp. 398 (U.S.D.C., E.D.N.Y. 1961), affirmed 305 F. 2d 139 (2nd Cir. 1962) 12, 14
Nederlandsch-Amerikaansche Stoomvaart-Maatschappij v. Vassallo, 365 S.W. 2d 650 ..... 1, 8
Parenzan v. Ino K. K. Kaisuya, 251 F. 2d 928 (2nd Cir. 1958), certiorari denied 356 U.S. 939 (1958) 13
Pope & Talbot v. Hawn, 346 U.S. 406 (1953) 10
Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956) 6, 7, 12
Smith v. Jugoselvenska Linijska Plovidea, 278 F. 2d 176 (4th Cir. 1960) 13
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 10
United States v. Rothschild International Stevedoring Co., 183 F. 2d 181 (9th Cir. 1950) 14
Vassallo v. Nederl-Amerik Stoomv Maats Holland, 337 S.W. 2d 309 (Tex. Civ. App. 1960) 6
Vassallo v. Nederl-Amerik Stoomv Maats Holland, 344 S.W. 2d 421 (Tex. Sup. Ct. 1961) 6
Weigel v. M/V Belgrano, 188 F. Supp. 605 (U.S.D.C., Ore. 1960); reversed on other grounds, 299 F. 2d 897 (9th Cir. 1962), modified pending further appeal, 302 F. 2d 730 (9th Cir. 1962), certiorari denied 371 U.S. 830 (1962) 14
Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 355 U.S. 563 (1958) 7, 12

Constitution

U. S. Const., Art. III, 2 ..... 2, 10

Miscellaneous

Your American Merchant Marine by Gibbs, H.M. 9
Ocean Transportation by McDowell & Gibbs 9

No. .....

In The

Supreme Court of the United States

October Term, 1963

Holland-America Line,

Petitioner,

v.

Texports Stevedoring Company, Inc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioner, Holland-America Line (Nederlandsch-Amerikaansche Stoomvaart-Maatschappij), prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas entered in the above-entitled case on February 14, 1963.

OPINION BELOW

The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas is reported *sub nom* as *Nederlandsch-Amerikaansche Stoomvaart-Maatschappij* v. *Vassallo* at 365 S.W. 2d 650 and is printed in Appendix A hereto, *infra*, p. 15. The Supreme Court of Texas affirmed

without an opinion, and its judgment is printed in Appendix A hereto, *infra*, p. 32. The judgment of the District Court of Harris County is printed in Appendix A hereto, *infra*, p. 35.

JURISDICTION

The judgment of the Court of Civil Appeals was entered on February 14, 1963. A timely motion for rehearing was filed on February 28, 1963, and overruled on March 14, 1963. Application to the Supreme Court of Texas for writ of error, filed April 12, 1963, was refused without opinion on July 10, 1963. Timely motion for rehearing, filed July 23, 1963, was overruled on July 24, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). [The opinion of the Court of Civil Appeals deals exclusively with federally created maritime law and the Court of Civil Appeals has deprived petitioner of its rights under this law.]

QUESTION PRESENTED

Can a stevedore escape liability to a shipowner, notwithstanding the stevedore's breach of its warranty of workmanlike service in negligently continuing to use a known defective winch, on the ground that the shipowner's failure to supervise, discover the defects, and stop the work amounted to "conduct on its part sufficient to preclude recovery."

CONSTITUTION PROVISION INVOLVED

Article III, 2, of the Constitution provides: "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

STATEMENT OF THE CASE

A death action for the benefit of the surviving wife and two children of Roland Vassallo was brought against petitioner by reason of fatal injuries Vassallo sustained while employed as a longshoreman by respondent, an independent stevedore contractor, on board petitioner's vessel, the SS EEMDYK, in Galveston, Texas on May 26, 1957.

Petitioner first raised the federal question sought to be reviewed herein by impleading respondent as third party defendant, claiming indemnity under theories of federally created maritime law. (Defendant's Fourth Amended Original Answer and Third Party Action; Transcript p. 36, and printed *infra*, in Appendix B, p. 65).

Following trial by jury, petitioner was held liable to the original plaintiffs and petitioner's claim for indemnity from respondent was denied by the trial court's judgment of September 20, 1961 (Transcript p. 290 and printed *infra*, in Appendix A, p. 35).

Petitioner's first point on appeal to the Court of Civil Appeals presented the question of petitioner's right to indemnity under the controlling maritime law. (See the Opinion of the Court of Civil Appeals in Appendix A hereto, p. 15, at p. 16). The Court of Civil Appeals affirmed the trial court's judgment denying petitioner indemnity from respondent. The opinion of the Court of Civil Appeals clearly shows the case was decided on the federal maritime law issues involved, and the decision did not rest in whole or in part on any other ground.

The SS EEMDYK arrived in Galveston on May [illegible] 1957. Petitioner hired respondent to perform all stevedoring operations on the ship. The written contract between petitioner and respondent contained no express indemnity pro-

vision. It provided the work was to be at all times under the direct supervision of petitioner's agents.

All cargo loading equipment, including ship winches, was operated by respondent's longshoremen. Throughout the morning, respondent's employees observed the port winch at the forward end of No. 5 hatch was not operating properly. (Statement of Facts, pps. 51, 200, 201, 202, 298, 299, 1400, 1401). Conflicting evidence was introduced on the issue of whether petitioner's cargo officers received notice of the defects in the winch. The longshoremen said they complained; the ship's officers denied there were any complaints. (Statement of Facts, pps. 1110, 1200, 1225 and 1387).

Respondent's chief on-board supervisor, walking foreman Earl Gensemer, learned the port winch was acting irregularly as soon as the work began (Statement of Facts, pps. 1400-1401). He permitted the longshoremen to continue using this winch with this knowledge, although he admitted it was his duty to stop work upon learning of a condition making the stevedoring operations dangerous (Statement of Facts, pps. 1398-1399).

Shortly before noon, the longshoremen were covering the No. 5 hatch. The two winches at the forward end of the hatch, including the defective port winch, were being used to lift heavy steel hatch beams into place. Vassallo stood by to release the port winch cable from a beam. As the beam was lowered into its sockets, Vassallo tried to release the cable, but there was too much tension. He signaled to the port winch operator for more slack. The port winch operator moved the winch control lever the wrong way, further tightening the cable, and Vassallo's hand was pinned between the cable and the beam. The beam was lifted up on Vassallo's side of the hatch. With his hand still caught, Vassallo was pulled into the air. The beam swung back, striking the adjacent beam. Vassallo was crushed between

them. From the injuries received, Vassallo died some twenty-five minutes later. (Statement of Fact, pps. 1111-1113; 1285-1289; 376-384; 773).

Respondent selected and used the two winches at the forward end of the No. 5 hatch, including the defective port winch. Unused, but available, was another pair of winches and booms at the other end of the hatch that could have been rigged to do the work. No attempt was made by respondent to rig the alternate set of winches after discovering the defects in the forward port winch. Respondent would have been paid for the time in rigging the alternate winches. (Statement of Facts, pps. 127-128; 356; 1019-1021).

The case was submitted to a jury on special issues. The jury's answers established that Vassallo met his death from a combination of causes: (1) the defective condition of the winch, (2) the negligence of petitioner, (3) the negligence of respondent, and (4) Vassallo's own negligence. The jury's answers to the seventy-four special issues of fact submitted to them for their determination are contained in full in the trial court's judgment of September 20, 1961, printed *infra*, in Appendix A, p. 35.

The negligence of petitioner, as established by the jury's findings, covered the petitioner's failure to keep the winch in repair, turning over a defective winch to respondent, not making repairs to the winch and permitting loading operations to continue after petitioner either knew or should have known of the defects. The negligence of the respondent covers the respondent's continued use of the winch with knowledge that it was defective and with knowledge that petitioner had not kept the winch in repair. The jury also found respondent's winch operator moved the control lever the wrong way; that he left his winch without cutting off the control switch; and that he failed to

use the winch foot brake. The conduct of respondent's winch operator in these regards was not found to be negligent.

Based upon the jury's findings, the trial court originally denied recovery. On appeal of this judgment, the plaintiffs were successful. The appellate opinions are reported as *Vassallo* v. *Nederl-Amerik Stoomv Maats Holland*, 337 S.W. 2d 309 (Tex. Civ. App. 1960) and *Vassallo* v. *Nederl-Amerik Stoomv Maats Holland*, 344 S.W. 2d 421 (Tex. Sup. Ct. 1961). Petitioner has paid off the judgment, and plaintiffs below are no longer parties to the litigation.

REASONS FOR GRANTING THE WRIT

There are several compelling reasons why a review on writ of certiorari should be granted in this case:

1. The decision of the Court of Civil Appeals below is in direct conflict with decisions of the Supreme Court of the United States.
2. The decision concerns an extremely important question of federal maritime law that warrants the attention of this Court.
3. The decision goes beyond the established maritime law and reaches an erroneous result.

1. CONFLICT

The decision of the Court of Civil Appeals that petitioners claim against respondent for indemnity should be defeated by reason of petitioners' failure to "discover unsafe conditions and stop the work until they were corrected" is in direct conflict with the decisions of this Court in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,

350 U.S. 124 (1956) and *Weyerhaeuser Steamship Co.* v *Nacirema Operating Co.*, 355 U.S. 563 (1958).

This Court, in *Ryan*, established that a stevedore hired to load or unload cargo owes to the shipowner an implied contractual warranty of safe and workmanlike service. The warranty was compared by this Court to a manufacturer's warranty of the soundness of its manufactured product. Where the stevedore breaches its warranty, the *Ryan* case holds the stevedore liable to indemnify the shipowner for its damages which result from the breach, including damages the shipowner may owe to an injured longshoreman.

In *Ryan*, the shipowner became liable to an injured longshoreman due to the shipowner's negligence in failing to discover and correct a dangerous condition in the cargo stowage. The stevedore had improperly stowed the cargo. The stevedore attempted to escape liability for indemnity on the ground that the shipowner had the duty to supervise the stowage and should have rejected the unsafe stowage. In declaring the right of the shipowner to obtain full indemnity, this Court *assumed the shipowner did have the obligation to supervise* and said (350 U.S. at 134):

> ". . . Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach."

The opinion of the court below recognizes a breach by respondent of its warranty of workmanlike service in con-

tinuing to use a defective winch with knowledge of the defective condition, which conduct was negligent and a proximate cause of the accident which took the life of Roland Vassallo.

But compare this Court's language quoted above in *Ryan* with the language quoted below from the Court of Civil Appeals (Appendix A herein, p. 26):

> ". . . While in this case the shipowner did not assure the stevedoring company that the winch was safe (as in the Hodgson case, supra), the company had a contractual right to expect that the ship's officers would discover unsafe conditions and stop the work until they were corrected. This breach of contract is conduct on the part of the shipowner sufficient to preclude recovery of indemnity. (Citing cases).

In *Ryan*, the shipowner was entitled to indemnity under the maritime law because of the stevedore's breach of its warranty to safely and properly load the cargo, even though the shipowner was negligent in failing to discover and correct a defective condition, and though the shipowner had the duty to supervise the stevedore. Yet the court below has held the shipowner is *not* entitled to indemnity under the maritime law, despite the stevedore's recognized breach of warranty, because the shipowner had the duty under the contract to supervise the stevedore and failed to stop the stevedore from working with a defective winch and correct the defects, even though the stevedore had full knowledge of the winch's condition.

The decision below is also in conflict with this Court's *Weyerhaeuser* decision. In that case a longshoreman was injured when a board from a defectively constructed winch shelter fell off and struck him. The shipowner was liable to the longshoreman on grounds of unseaworthiness and

negligence. But the stevedore company's warranty of workmanlike service was held by this Court to include the use of equipment incidental to the handling of cargo, and the shipowner's failure "to inspect the shelter, detect and correct the unsafe condition" . . . "would not, under Ryan, prevent recovery by petitioner in the third-party action." (355 U. S. at 568).

The decision below cannot properly be distinguished, as respondent might attempt, on the basis that the respondent did not create the defective winch. The fact that the winch was defective at the outset does not relieve the respondent. In *Crumady* v. *Joachim Hendrik Fisser*, 358 U.S. 423 (1959), the shipowner furnished the stevedore with a defectively adjusted winch. The negligence of the stevedore brought the unseaworthiness of the winch into play and amounted to a breach of the warranty of workmanlike service. The shipowner was entitled to recover indemnity.

2. IMPORTANCE

The importance to the maritime industry of having clarity in the maritime law and uniformity in its application cannot be exaggerated. An estimated 5,000 ships annually call at United States ports to load and discharge cargo, and some 72,000 longshoremen carry out the work.[1] The United States has the longest coastline, over 4,800 miles,[2] of any nation of the world, and twenty four states in the nation border the Atlantic, Pacific or the Gulf of Mexico.

The need for a uniform and harmonious body of federally created substantive maritime law has frequently compelled

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[1] Figures are from the Department of Commerce, Maritime Commission, as reported in "Your American Merchant Marine" by Gibbs, H. M., 1960.

[2] "Ocean Transportation" by McDowell & Gibbs, 1954.

this Court to step forward and strike down attempts at the state level to carve out exceptions, as, for example, efforts by the states to include longshoremen under state compensation statutes. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

The need for a uniform approach in admiralty and maritime matters was recognized when this nation was established and the federal judiciary's power, by Article III, Section 2, of the United States Constitution, was extended "to all cases of admiralty and maritime jurisdiction." While state courts have concurrent jurisdiction to hear many maritime cases, such courts are bound to apply and follow the federally created substantive maritime law. In *Pope & Talbot* v. *Hawn*, 346 U.S. 406 (1953), at 409-410, this Court held:

> ". . . While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."

The strength of this country's maritime industry, and the maintenance of continued good relations with maritime nations throughout the world, depends in no small measure upon a uniform and harmonious application of the laws governing maritime rights. This Court, by its decisions in *Ryan*, *Weyerhaeuser*, and *Crumady*, has removed all doubt that rights between shipowners and stevedores are to be measured by federal maritime law. In this area, there cannot be one set of rules for Texas, another for New York, and so on from state to state.

The stevedore's warranty of workmanlike service, established by this Court in *Ryan*, has been effectively cancelled in Texas by the decision below.

The decision below is important to the 72,000 longshore men who carry out the actual stevedoring work, for these men will be the real losers if the decision stands. Where they are employed by an independent stevedoring contractor, such as respondent, rather than by the shipowner, the longshoremen naturally look to their employer's supervisors and foremen for instructions and guidance. If the stevedore's supervisors and foremen, who are immediately in charge of the longshoremen, negligently permit work to continue with equipment known to be dangerous and the stevedore is not thereafter required to indemnify the shipowner for the resulting damages, the stevedore's concern for his employees' safety and well being will decline and longshoremen's injuries and deaths will mount.

By no means does this argument intend to imply that the shipowner should be permitted to ignore dangerous conditions aboard his vessel. Certainly, the shipowner is economically interested in efficient, accident free cargo handling. Damages paid by stevedores as the result of a breach of their warranty of workmanlike service ultimately are paid by shipowners in higher stevedoring rates.

But as between the shipowner and the stevedore, it is the stevedore who is closest to the longshoremen. It is the stevedore who likely will first recognize a dangerous condition. It is the stevedore who holds himself out as the expert in handling cargo. And it is the stevedore who can most quickly and readily halt the work when danger is seen.

The decision below permits the stevedore, in all cases where the shipowner has the duty to supervise, virtually to forget its warranty of workmanlike service. The decision, for this reason, invites disaster.

3. ERROR IN DECISION BELOW

In *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958), this Court held that the breach of the stevedore's warranty entitled the shipowner to indemnity "absent conduct on its part sufficient to preclude recovery." The decision below, admitting respondent breached its warranty, erroneously held petitioner's conduct was sufficient to preclude indemnity. Petitioner has attempted to examine every reported indemnity case involving stevedores and shipowners. As a result of this search, petitioner comes to the same conclusion as did the court in *Drago* v. *A/S Inger*, 194 F. Supp. 398, at 405:

> "No case has been found where the shipowner has been denied indemnity because its own conduct was so gross as to excuse performance by the stevedore. Indemnity has of course been denied because the stevedore has not breached its warranty."

Petitioner's conduct, as measured by the cases reported, was well within the permissible limits where indemnity was granted. Compare these cases:

1. The shipowner failed to inspect, detect and correct the unsafe condition of a temporary winch shelter. Although such failure would provide the injured longshoreman a basis of recovery from the shipowner, it did not prevent recovery by the shipowner of indemnity from the stevedore. *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958).

2. The shipowner negligently failed to discover and correct a defective condition in the stowage of cargo. The shipowner did not properly perform its admitted duty to supervise the safe and careful loading of the vessel and had authority to remedy the condition or halt the work. Indemnity was granted. *Ryan Stevedoring Co.*

v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956); and similarly *Parenzan* v. *Ino K. K. Kaisuna*, 251 F. 2d 928 (2nd Cir. 1958), certiorari denied 356 U.S. 939 (1958).

3. The shipowner supplied the stevedore with a winch that the shipowner had negligently and improperly adjusted so that the automatic cutoff device was set at twice the safe working load limit. The negligence of the stevedore brought this unseaworthy condition into play. Indemnity was granted: *Crumady* v. *Joachim Hendrik Fisser*, 358 U.S. 423 (1959).

4. The shipowner supplied a defective winch to the stevedore. The shipowner was negligent in failing to inspect the winch. The stevedore learned of the defect, but continued to load the ship. Indemnity was granted *American Export Lines, Inc.* v. *Bucci*, 266 F. 2d 82 (4th Cir. 1959).

5. The shipowner furnished the stevedore with an improperly secured hatch ladder which the stevedore failed to recognize as dangerous. Indemnity was granted. *Smith* v. *Jugoslovenska Linijska Plovidba*, 278 F. 2d 176 (4th Cir. 1960).

6. The shipowner negligently supplied the stevedore with a defective light cable that broke when the stevedore negligently dropped it into the hold. Indemnity was granted. *Calmer Steamship Corp.* v. *Navieroa Operating Co.*, 266 F. 2d 79 (4th Cir. 1959), certiorari denied 361 U.S. 816 (1959).

7. The shipowner did not provide the stevedore with a safety pin on the winch to keep the lever in neutral and the shipowner was negligent in not repairing a dangerous condition that it reasonably should have discovered. Indemnity was granted. *Drago* v. *A/S*

APPENDIX A

APPENDIX B

Inger, 194 F. Supp. 398 (U.S.D.C., E.D.N.Y. 1961), affirmed 305 F. 2d 139 (2nd Cir. 1962).

8. The shipowner turned over unseaworthy topping lift gear to the stevedore and the shipowner was negligent in failing to discover the defect. The stevedore had actual knowledge. Indemnity was granted. *Weigel* v. *M/V Belgrano*, 188 F. Supp. 605 (U.S.D.C., Ore. 1960), reversed on other grounds, 299 F. 2d 897 (9th Cir. 1962), modified pending further appeal, 302 F. 2d 730 (9th Cir. 1962), certiorari denied 371 U.S. 830 (1962).

9. The shipowner supplied the stevedore with a defective winch. The stevedore had warning of the defect. Indemnity was granted. *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181 (9th Cir. 1950).

10. The shipowner supplied hatch beams with defective locks on them. Both the shipowner and the stevedore had knowledge of the unsafe condition. Indemnity was granted. *American President Lines, Ltd.* v. *Marine Terminals Corp.*, 234 F. 2d 753 (9th Cir. 1956), certiorari denied 352 U.S. 926 (1956).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: October 7, 1963

Respectfully submitted,

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APPENDIX A

APPENDIX B

APPENDIX A

OPINIONS AND JUDGMENTS BELOW

Court of Civil Appeals Opinion

In The
COURT OF CIVIL APPEALS
For the First Supreme Judicial District of Texas

No. 13965

Nederlandsch-Amerikaansche-Stoomvaart-Maatschappij; Holland-America Line,

Appellant,

v.

Mrs. Connie Vassallo, et al.,

Appellees.

Appeal from District Court of Harris County

This is an appeal by Holland-America Line from a judgment denying it indemnity against Texports Stevedoring Company, Inc. Both Holland-America Line and Texports Stevedoring Company, Inc. have appealed from that portion of the trial court's judgment awarding interest to the plaintiffs, the widow and surviving children of Roland Vassallo.

Roland Vassallo received injuries resulting in his death while employed as a stevedore by Texports aboard the SS Eemdyk, which was owned and operated by Holland-America Line. Mrs. Connie Vassallo brought suit for damages against Holland-America Line, who impleaded Tex-

ports as a third party defendant to obtain indemnity under the applicable federal maritime law.

The answers made by a jury established that Vassallo met his death from a combination of causes: the defective condition of one of the vessel's winches, the negligence of the ship owner, the negligence of Texports, and Vassallo's contributory negligence. On June 26, 1959, judgment was entered that plaintiffs take nothing. On appeal the judgment of the trial court was reversed by the Supreme Court of Texas and the case was remanded to the trial court with instructions to enter judgment in favor of the plaintiffs in accordance with the opinion. Vassallo v. Nederl-Amerik Stoomv Maats Holland, 344 S.W. 2d 421.

On September 20, 1961, the trial court entered its second judgment awarding plaintiffs damages against the ship owner. The judgment denied the ship owner's plea for indemnity and awarded interest on the damages at the rate of 6% from June 26, 1959, the date of the first judgment.

Holland-America Line has predicated its appeal on two points: (1) The Trial Court erred in entering judgment that the shipowner take nothing from the Stevedore in the Shipowner's third party action for indemnity because the findings of the jury established under the controlling maritime law that the Stevedore breached its implied contractual warranty of safe and workmanlike service and those findings required the entry of judgment for the Shipowner; and (2) The Trial Court erred in entering judgment that interest on the plaintiffs' recovery was to accumulate from June 26, 1959, the date of the original judgment (wherein plaintiffs took nothing), rather than from September 20, 1961, the date of the judgment which first created an obligation on the part of appellant to pay damages to the plaintiffs.

The following facts are established by the answers to special issues submitted to the jury:

Special Issues Nos. 1 and 2: That the port winch serving the forward part of No. 5 hatch was defective, which was a proximate cause of the accident.

Special Issues Nos. 3 and 4: That the shipowner negligently failed to keep this winch in repair and such failure was a proximate cause of the accident.

Special Issues Nos. 5, 6 and 7: That the shipowner negligently failed to supply Vassallo with a reasonably safe place to work, which was a proximate cause of the accident.

Special Issues Nos. 15 and 16: That Vassallo failed to keep a proper lookout for his own safety which was a proximate cause of the accident.

Special Issues Nos. 17, 18 and 19: That Vassallo negligently gave the operator of the port winch a signal to operate the winch while the port winch line was attached to the beam bridle and while his hand was in a position to be caught between the beam bridle chain and the beam, which was a proximate cause of the accident.

Special Issues Nos. 21 and 22: That Vassallo negligently failed to remove his hand from between the beam bridle chain and the beam, which was a proximate cause of the accident.

Special Issues Nos. 30 and 31: That the Stevedore negligently continued to use the winch with knowledge that it was defective, which was a proximate cause of the accident.

Special Issues Nos. 32 and 33: That the Stevedore negligently continued to use the winch with knowledge that the shipowner had not kept it in repair, which was a proximate cause of the accident.

Special Issues Nos. 34 and 35: That the Stevedore negligently continued steyedoring operations with knowledge that Vassallo had not been furnished a reasonably safe place to work, which was a proximate cause of the accident.

Special Issues Nos. 38 and 39: That the Stevedore's winch operator, Clyde Townsend, moved the winch control lever into hoist position just before the accident occurred, though this was not found to be negligent.

Special Issues Nos. 42, 43 and 44: That the Stevedore's winch operator, Clyde Townsend, knew or should have known the port winch had an "on" and "off" switch, and that just before the accident he left his winch without cutting off such switch, though this was not found to be negligent.

Special Issues Nos. 46 and 47: That the Stevedore's winch operator, Clyde Townsend, just prior to the accident failed to make such use of the foot brake on the port winch as would have been made by a person of ordinary prudence in the exercise of ordinary care under the same or similar circumstances, though this was not found to be negligent.

Special Issues Nos. 49, 50, 51, 52 and 53: That the port winch was defective when turned over to the longshoremen, that the shipowner knew or should have known this for a sufficient period of time for repairs to have been made, that it was negligent in not making repairs and such negligence was a proximate cause of the accident.

Special Issues Nos. 54, 55 and 56: That the shipowner negligently permitted loading operations to continue after it knew or should have known of the defective condition of the port winch, which was a proximate cause of the accident.

Special Issues 57, 58, 59 and 60: That the shipowner failed to supply Vassallo with a reasonably safe place to work, that it knew or should have known the place was not reasonably safe, and that it negligently failed to make the place reasonably safe after it knew or should have known that it was not safe, which failure was a proximate cause of the accident.

Special Issues Nos. 61, 62 and 64: That the shipowner negligently permitted loading operations to continue after it knew or should have known that the place supplied to Vassallo was not reasonably safe, which was a proximate cause of the accident.

It was stipulated that there was a written contract between Texports Stevedoring Company, Inc. and Holland-America Line for the Stevedoring work aboard the SS Eemdyk on May 26, 1957, containing many provisions, among which is the following: "The work at all times to be under direct supervision of the agents of Holland-America Line in consultation with their representatives, who will decide as to the number of gangs and hatches to be worked, storage of cargo. . . .", etc. It was also stipulated that the contract contained no provision whereby either party assumed any responsibility for damages resulting from death other than that assumed by Texports under applicable Workmen's Compensation Acts. The contract document was not introduced into evidence.

The liability of the stevedore to indemnify the shipowner can arise only by reason of breach of contract. American Mutual Liability Company v. Matthews, Ga. 2 C., 1950, 182 F. 2d 322; Halcyon Lines v. Haenn Ship Ceiling & Refitting Corporation, 1952, 342 U.S. 282. Negligence of the stevedore is pertinent only insofar as it amounts to a breach of contract. Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation, 1956, 350 U. S. 124, 100 L. Ed. 133, 76 S. Ct. 232. Here the jury found that the stevedore continued to use the defective winch with knowledge of the defect and that such conduct was negligent and a proximate cause of the injury to the longshoreman (for which the ship was required to pay damages).

In the Ryan case, supra, the court held:

> "The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service."

In Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 1958, 355 U.S. 563, 2 L. Ed. 2d 394, 78 S. Ct. 442, the court said:

> "We believe that respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in Ryan, but also to the use of equipment incidental thereto, such as the winch shelter involved here. [citing cases] If in that regard respondent rendered a substandard performance which led to foreseeable liability of petitioner, the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery."

The doctrine of the Ryan case was further extended in Crumady v. Joachim Hendrik Fisser, 1959, 358 U.S. 423, 3 L. Ed. 2d 413, 79 S. Ct. 445. In this case the Supreme Court pointed out that while the vessel was unseaworthy in that a circuit breaker attached to a winch was set to cut off at a

load considerably in excess of the safe working load of the cargo gear, the negligence of employees of the stevedore in moving a boom brought into play the unseaworthy condition of the circuit breaker, thereby causing the accident. The court held that this negligence amounted to a breach of the warranty of workmanlike service.

The jury has found that the continued use of the defective winch with knowledge of its defective condition was negligence on the part of the stevedoring company. Applying the doctrine of the Weyerhaeuser case, the stevedoring company reasonably could foresee that such conduct would cause an accident for which Holland-America Line would be liable because of the unseaworthy condition of the winch. The stevedoring company questions the conclusion that the jury finding of negligence necessarily presupposes a finding of the violation of a duty owed by it to the shipowner as well as a violation of a duty owed to the longshoreman. It contends that the contractual duty to unload the ship with reasonable safety, as applied to its use of equipment supplied by the ship, extends no further than to require it to operate such defective equipment with reasonable care. It contends that its duty to the ship does not require a refusal to use defective equipment. The contention seems to be that the stevedoring company's duty of reasonable care to its employee might be breached by use of defective equipment even though the equipment was used with the utmost care, but that the use of defective equipment under such circumstances would not constitute a breach of its contractual duty to the ship to perform the stevedoring operations in a reasonably safe and workmanlike manner, and that evidence sufficient to persuade the jury that its conduct was negligent insofar as the employee was concerned would not necessarily convince the jury that the same conduct would be negligent insofar as the ship is concerned. While this objection to the

court's charge was made in the trial court, no specific counterpoint is raised on appeal. Texports argues that the finding should not be held a finding of negligence toward the ship and that the appellants have not secured proper jury findings of breach of contract and, by failing to request submission of proper issues, have waived recovery on the theory of breach of contract. In support of their theory the contractor has cited Smith v. Pan-Atlantic Steamship Corporation, 161 F. Supp. 422, aff'd per curiam 254 F. 2d 600, 3rd Cir., 1958, in which the court said that it may have been negligence for the stevedore to continue to use a defective winch rather than to walk off the job, but it was "in furtherance of his contract rather than a breach of it, and the shipowner could hardly hold him liable for trying to complete the work."

In Hodgson v. Lloyd Brasileiro Patrimonio Nacional v. Murphy-Cook & Co., 294 F. 2d 32, 3rd Cir. 1961, cert. den. 369 U.S. 848, 8 L. Ed. 2d 8, 82 S. Ct. 931, 1962, the court held that whether the stevedoring company's conduct in continuing to operate a winch known to be defective constituted a breach of its contract to perform its services in a workmanlike, proper and reasonably safe manner was a question of fact for the jury, as was the question of whether its conduct "brought into play" the unseaworthiness of the vessel. In its opinion the court calls attention to the fact that the stevedoring company recieved "a categorical assurance from the ship owner's crew that it (the winch) was 'O.K.' and on this basis distinguishes Calderola v. Cunard S. S. Co., 2 Cir. 279 F. 2d 475; Smith v. Jugoslavenska Linijska Plovidea, 4 Cir., 1960, 278 F. 2d 176; Weigel v. The M V Belgrano, D.C.D. Or. 1960, 188 F. Supp. 605, and Hugev v. Dampskisaktieselskabet International, D.C.S. D. Cal. 1959, 170 F. Supp. 601, affirmed, 9 Cir., 274 F. 2d 875, cert. den. 1960, 363 U. S. 803, 80 S. Ct. 1237, 4 L. Ed. 2d 1147."

In the Hugev case, supra, the court said:

> ". . . the obligation is one implied in fact, and not in law, and the content of this implied-in-fact obligation on the part of the stevedoring contractor is to perform the stevedoring service for his customer, the shipowner, in a workmanlike manner and with reasonable safety to persons and property . . .
>
> ". . . It includes also the duty to suspend the loading or unloading operations on its own initiative, and thus to avoid injury or damage, whenever the stevedore realizes that it would be unsafe under the circumstances to proceed. United States v. Arrow Stevedoring Co., 9 Cir., 1949, 175 F. 2d 329, certiorari denied, 1949, 338 U.S. 904, 70 S. Ct. 307, 94 L. Ed. 557; The Adah, 2 Cir., 1919, 258 F. 377, 380; The Robert R., 2 Cir., 1918, 255 F. 37, 39; Smith v. Nicholson Transit Co., D.C.W. D.N.Y. 1941, 39 F. Supp. 795, 797. So if the stevedoring contractor renders a substandard performance which foreseeingly leads to the shipowner's liability to a longshoreman, the shipowner would be 'entitled to indemnity absent conduct on its part sufficient to preclude recovery.' [citing authority]."

The jury's finding in this case that Texports' conduct in continuing to use a defective winch with knowledge of the defective condition was negligence and a proximate cause of the accident constitutes findings of fact sufficient to require the conclusion of law that Texports had violated its warranty to perform its services with reasonable safety to members of its working force.

In the Hugev case that court also held that a material breach of the contract on the part of the ship owner would preclude his recovery of indemnity under the rule of the Weyerhaeuser case, supra. It held that the implied warranty of seaworthiness does not extend to the stevedoring contractor and that the obligations due the contractor by the ship owner must be found in its contract, either expressly,

or implied in fact from the circumstances surrounding the contract and its performance.

The court in the Hugev case found three implied-in-fact obligations on the part of the ship owner, only one of which is applicable under the facts of this case. This obligation on the ship owner is "to exercise ordinary care under the circumstances to place the ship on which the stevedoring work is to be done, and the equipment and appliances aboard ship, in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care under the circumstances to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to persons and property."

Merely furnishing defective equipment is not such a breach of the contract on the part of the ship owner as to forfeit any right to indemnity which he might have by reason of a breach of warranty on the part of the stevedoring contractor. Crumady v. Joachim Hendrik Fisser, supra; Weyerhaeuser Steamship Co. v. Nacirema Operating Co., supra.

While the jury found the ship owner negligent in certain respects, negligence will not defeat the right to indemnity unless such negligence constitutes a breach of the contract with the stevedoring contractor. Conduct which might be a breach of a duty owed by the ship owner to a seaman or longshoreman would not necessarily amount to a breach of this contract. Thus, in Weyerhaeuser breach of a legal duty to inspect, detect and correct an unsafe condition did not defeat the ship owner's right to indemnity.

The jury found that after the ship owner knew, or should have known, of the defective condition of the winch, he negligently failed to make necessary repairs, but the stipulation of the parties does not show a contractual duty to make repairs. While no case has been cited holding that there is implied in fact a contractual duty to make repairs, the holding in the Hugev case impliedly negatives such a duty.

The jury found that the ship owner also permitted loading operations to continue after he knew, or should have known, that the winch was defective and that this constituted negligence, and a proximate cause of the accident. In support of the judgment it will be assumed that the trial court concluded that this conduct was a breach of that provision of the contract providing that the work was to be done under the direct supervision of agents of Holland America Line.

In Von Rosenberg v. Lovett, Tex. Civ. App., 173 S.W. 508, writ ref., the court said: "To supervise does not mean to do the work in detail, but to see that it is done. It means to oversee, with power of direction."

A common meaning of "supervise" is "to superintend," which was defined by the Supreme Court of Texas in Burrell Engineering & Construction Co. v. Grisier, 240 S.W. 899, as meaning: "To have charge and direction of; to direct the course and oversee the details; to regulate with authority; to manage; to have or exercise the charge and oversight of; to oversee with the power of direction; to take care of with authority; to oversee; to overlook."

The reasoning of the Supreme Court of the United States in the Ryan case, supra, requires a holding that where there is an agreement to supervise the stevedoring operation, there is implied in fact a covenant to carry out this

work in a careful and workmanlike manner. A negligent failure to stop the work after discovering that the winch was defective, or after receiving notice of its defective condition, would as a matter of law amount to a breach of this covenant. While in this case the ship owner did not assure the stevedoring company that the winch was safe (as in the Hodgson case, supra), the company had a contractual right to expect that the ship's officers would discover unsafe conditions and stop the work until they were corrected. This breach of contract is conduct on the part of the ship owner sufficient to preclude recovery of indemnity. Weyerhaeuser Steamship Company v. Nacirema Operating Co., supra; Hodgson v. Lloyd Brasileiro Patrimonio Nacional v. Murphy-Cook & Co., supra; Hugev v. Dampskisaktieselskabet International, supra.

It might be argued that the agreement to supervise applied only to such matters as determining the number of gangs, hatches to be worked and stowage of cargo. Since the contract provides that "The *work at all times* to be under direct supervision . . .," it seems reasonable to conclude that *all* of the work would be supervised by agents of Holland-America Line.

On June 26, 1959 the trial court entered its original judgment in this case denying plaintiffs recovery. The Supreme Court reversed and remanded the cause with instructions to enter judgment for plaintiffs in accordance with its opinion. This was an instruction to enter the judgment which the trial court should have entered on July 26, 1959. The judgment properly included interest at the rate of 6% per annum from that date. Houston Gas & Fuel Company v. Perry, Tex. Com. App., 91 S.W. 2d 1052, opinion adopted; Texas Power Corp. v. Kuehler, Tex. Com. App., 52 S.W. 2d 76; Smith v. American Fire and Casualty Company, Tex.

Civ. App., 242 S.W. 2d 448; Parkerson v. American Hospital & Life Ins. Co., Tex. Civ. App., 322 S.W. 2d 27, writ dism.; D. C. Hall Transport, Inc. v. Hard, Tex Civ. App., 355 S.W. 2d 257, aff'd 358 S.W. 2d 117.

The judgment of the trial court is affirmed.

/s/ Tom F. Coleman
Associate Justice

Judgment rendered and opinion filed February 14, 1963.

Court of Civil Appeals Judgment

BE IT REMEMBERED

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1962, present SPURGEON E. BELL, Chief Justice, and Associate Justices EWING WERLEIN and TOM F. COLEMAN.

In the cause

No. 13965

NEDERLANDSCH-AMERIKAANSCHE-STOOMVAART-MAATSCHAPPIJ; HOLLAND-AMERICA LINE,

Appellant,

v.

From District Court of Harris County
Tr Ct #487,017
Opinion by Coleman, J

MRS. CONNIE VASSALLO ET AL.,

Appellees.

the following judgment was rendered February 14, 1963:

"This cause, being an appeal from the judgment rendered and entered by the court below on September 20, 1961, came on to be heard on the transcript of the record; and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellant, Nederlandsch-Amerikaansche-Stoomvaart-Maatschappij; Holland-America Line, and its surety, Hartford Accident & Indemnity Company, pay all costs in this cause incurred. It is further ordered that this decision be certified below for observance."

I, ROLA HAMM, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of the judgment rendered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 14, Page 307.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 13th day of August A.D. 1963.

/s/ ROLA HAMM
Clerk

Court of Civil Appeals Order

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1962, present SPURGEON E. BELL, Chief Justice, and Associate Justices EWING WERLEIN and TOM F. COLEMAN.

In the cause

No. 13965

NEDERLANDSCH-AMERIKAANSCHE-STOOMVAART-MAATSCHAPPIJ; HOLLAND-AMERICA LINE,

Appellant,

v.

From District Court of Harris County
Tr Ct #487,017
Opinion by .....

MRS. CONNIE VASSSALLO ET AL.,

Appellees,

the following order was rendered on March 14, 1963:

"It is ordered that appellant's motion for rehearing be overruled."

I, ROLA HAMM, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of an order entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 14, Page 313.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of said Court at Houston this 13th day of August A.D. 1963.

/s/ ROLA HAMM
Clerk

Supreme Court of Texas Orders

IN THE

SUPREME COURT OF TEXAS

No. A-9556.

July 10, 1963.

Nederlandsch-Amerikaansche Stoomvaart Mattschappij; Holland-America Line

vs.

Mrs. Connie Vassallo et al.

From Harris County, First District.

Application of petitioner for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicant, Nederlandsch-Amerikaansche-Stoomvaart-Mattschappij; Holland America Line, and its surety, Hartford Accident & Indemnity Company, pay all costs incurred on this application.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Order of the Supreme Court of Texas on Application for Writ of Error in the case of Nederlandsch-Amerikaansche Stoomvaart-Mattschappij; Holland-America Line vs. Mrs. Connie Vassallo et al., No. A-9556, from Harris County, First District, as such order appears of record in the minutes of said Court under date of July 10, 1963.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 22nd day of July, A. D. 1963.

GEO. H. TEMPLIN, Clerk
By /s/ CARL B. LYDA
Deputy.

APPENDIX B

IN THE

SUPREME COURT OF TEXAS

No. A-9556.

July 24, 1963.

Nederlandsch-Amerikaansche Stoomvaart-Mattschappij; Holland-America Line

vs.

Mrs. Connie Vassallo et al.

From Harris County, First District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Order of the Supreme Court of Texas on motion for rehearing of application for writ of error in the case of Nederlandsch-Americaansche Stoomvaart-Mattschappij; Holland-America Line vs. Mrs. Connie Vassallo et al., No. A-9556, as such order appears of record in the minutes of said Court under date of July 24, 1963.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 24th day of July, A. D. 1963.

GEO. H. TEMPLIN, Clerk

By s. CARL B. LYDA
Deputy.

District Court Judgment

JUDGMENT ENTERED: Volume 180, Page 65, General Minutes of the Judicial District Courts, in and for Harris County, Texas.

No. 487,017

MRS. CONNIE VASSALLO, ET AL. v. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ; HOLLAND-AMERICA LINE	In The District Court of Harris County, Texas 152nd Judicial District

BE IT REMEMBERED that on the 6th day of April, 1959, at a regular term of this Court there came on to be heard in its due and regular order the above entitled and numbered cause; thereupon came the Plaintiffs, Mrs. Connie Vassallo, a widow, individually and as next friend of Natalie Vassallo and Roland Charles Vassallo, minors, (Gerlando Vassallo, the father of Roland Vassallo who has heretofore filed a disclaimer herein) in person by and through their attorneys of record and also came the Defendant, Nederlandsch-Amerikaansche Stoomvaart-Maatschappij; Holland-America Line, in person and by and through its attorneys of record and came the Third Party Defendant, Texports Stevedoring Co., Inc., in person and by and through its attorneys of record, whereupon all parties announced ready for trial; thereupon came a jury of twelve duly qualified jurors, to-wit: J. H. Derrick, foreman, and eleven others, were duly drawn, impaneled and sworn in to try said cause, and then said cause proceeded to trial. Whereupon Plaintiffs introduced their testimony and rested, and thereafter the Defendant, Holland-America Line, introduced its testimony, and rested, and thereafter the Third Party Defendant, Texports Stevedoring Co., Inc.,

introduced its testimony and rested, and the jury having heard the pleadings, the evidence, the charge of the Court and argument of counsel, on the 27th day of April, 1959, retired to consider their verdict and after full consideration thereof, on the 1st day of May, 1959, returned their verdict in open court in the form of Special Issues and answers thereto, to-wit:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that at the time and on the occasion of the accident made the basis of this suit, the port winch serving the forward part of No. 5 hatch was defective?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 1, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that such defective condition, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * * *

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that at the time and on the occasion of the accident made the basis of this suit the Defendant failed to keep the port winch serving the forward part of No. 5 hatch in such state of repair as a reasonably prudent person in the exercise of ordinary care would have kept same under the same or similar circumstances?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 3, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * *

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that the Defendant failed to supply Roland Vassallo with a reasonably safe place in which to work?

To which the Jury answered: "We do."

* * * * * *

If you have answered Special Issue No. 5, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that such failure, if any, was negligence?

To which the Jury answered: "We do."

* * * * * *

If you have answered Special Issues Nos. 5 or 6 or either of them "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that such failure, if any you may have found in response to Special Issue No. 5, or such negligence, if any you may have found in response to Special Issue No. 6, was a proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * * * *

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that at the time of the accident made the basis of this suit the Defendant failed to furnish a beam bridle that was reasonably safe for workers such as Roland Vassallo to be used in unhooking the bridle from the beam?

To which the Jury answered: "We do not."

* * * * * * * *

If you have answered Special Issue No. 8, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * * * *

If you have answered Special Issue No. 8, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that such failure, if any, was negligence?

To which the Jury made no answer.

* * * * * * *

If you have answered Special Issue No. 10, "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * * *

If you have answered Special Issues Nos. 9 and 11, or either of them "We do," and only in that event, then answer:

SPECIAL ISSUE NO 12

Do you find from a preponderance of the evidence that just before the occurrence of the accident made the basis of this suit the condition of the beam bridle attached to the starboard end of the beam being handled by Mr. Roland Vassallo was open and obvious to him?

To which the Jury made no answer.

In connection with the foregoing issue you are instructed that a condition is "open and obvious" if it is known or if it should have been known by a person of ordinary prudence, in the exercise of ordinary care under the same or similar circumstances and if the full extent of the danger, if any, created by such condition is appreciated or if it should have been appreciated by a person of ordinary prudence acting in the exercise of ordinary care under the same or similar circumstances.

* * * * * * *

If you have answered Special Issues No. 2 and 4, or either of them, "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that just before the occurrence of the accident made the basis of this suit the condition of the port winch was open and obvious to Mr. Roland Vassallo?

To which the Jury answered: "We do not."

In connection with the foregoing issue, you are instructed that a condition is "open and obvious" if it is known or if it should have been known by a person of ordinary prudence, in the exercise of ordinary care under the same or similar circumstances and if the full extent of the danger, if any,

created by such condition is appreciated or if it should have been appreciated by a person of ordinary prudence acting in the exercise of ordinary care under the same or similar circumstances.

* * * * * *

If you have answered Special Issue No. 7, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 14

Do you find from a preponderance of the evidence that just before the accident made the basis of this suit the conditions you have found in connection with Special Issue No. 5, if any, was open and obvious to Roland Vassallo?

To which the Jury answered: "We do not."

In connection with the foregoing issue, you are instructed that a condition is "open and obvious" if it is known or if it should have been known by a person of ordinary prudence, in the exercise of ordinary care under the same or similar circumstances and if the full extent of the danger, if any, created by such condition is appreciated or if it should have been appreciated by a person of ordinary prudence acting in the exercise of ordinary care under the same or similar circumstances.

SPECIAL ISSUE NO. 15

Do you find from a preponderance of the evidence that just before the accident in question Mr. Roland Vassallo failed to keep such a lookout for his own safety as would have been kept by a person of ordinary prudence in the exercise of ordinary care under the same or similar circumstances?

To which the Jury answered: "We do."

* * * * * *

If you have answered Special Issue No. 15, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 16

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * *

SPECIAL ISSUE NO. 17

Do you find from a preponderance of the evidence that just before the accident made the basis of this suit Roland Vassallo gave the operator of the port winch a signal to operate said winch while the port winch line was attached to the beam bridle and while his hand was in a position to be caught between the beam bridle chain and the beam?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 17, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 18

Do you find from a preponderance of the evidence that such act, if any, was negligence?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 18, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 19

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident in question?

To which the Jury answered: "We do."

* * * * * * *

In the event that you have answered Special Issue No. 18 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 20

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do not."

* * * * * *

SPECIAL ISSUE NO. 21

Do you find from a preponderance of the evidence that just before the accident made the basis of this suit Roland Vassallo failed to remove his hand from between the beam bridle chain and the beam as soon as a person of ordinary prudence in the exercise of ordinary care would have done under the same or similar circumstances?

To which the Jury answered: "We do."

* * * * * *

If you have answered Special Issue No. 21, "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 22

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * *

SPECIAL ISSUE NO. 23

Do you find from a preponderance of the evidence that just before the accident made the basis of this suit Roland Vassallo attempted to unloosen the starboard end of the beam bridle when the starboard end of the beam was not latched in place?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 23, "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 24

Do you find from a preponderance of the evidence that such act, if any, was negligence?

To which the Jury answered: "We do not."

* * * * * * *

If you have answered Special Issue No. 24, "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 25

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * * *

SPECIAL ISSUE NO. 26

Do you find from a preponderance of the evidence that just before the accident made the basis of this suit Mr. Roland Vassallo failed to grasp the starboard end of the beam bridle in such a manner as same would have been grasped by a person of ordinary prudence in the exercise of ordinary care under the same or similar circumstances?

To which the Jury answered: "We do not."

* * * * * * *

If you have answered Special Issue No. 26 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 27

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * * *

If you have answered Special Issue No. 26, "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 28

Do you find from a preponderance of the evidence that such failure, if any, was the sole proximate cause of the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * * *

If you have answered Special Issues Numbers 12, 13, 14, 16, 19, 22, 25 and 27, or any of them, "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 29

From a preponderance of the evidence to what extent, if any, did the conduct, if any, on the part of Roland Vassallo as you may have found in response to Special Issues Nos. 12, 13, 14, or any of them, or to what extent, if any, did such negligence, if any, on the part of Roland Vassallo as you have found in response to Special Issues Nos. 16, 19, 22, 25 and 27, or any of them, proximately cause the accident made the basis of this suit?

To which the Jury answered: Five percent.

* * * * * * *

If you have answered Special Issue No. 2, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 30

Do you find from a preponderance of the evidence that the continued use of the winch by Texports Stevedoring Company, Inc., with knowledge of such facts as you may have found in connection with the Special Issue No. 1, was negligence?

To which the Jury answered: "We do."

* * * * * *

If you have answered Special Issue No. 30, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 31

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 4, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 32

Do you find from a preponderance of the evidence that the continued use of the winch by Texports Stevedoring Company, Inc., with knowledge of such facts as you may have found in connection with the Special Issue No. 3, was negligence?

To which the Jury answered: "We do."

* * * * * *

If you have answered Special Issue No. 32, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 33

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do".

* * * * * * *

If you have answered Special Issue No. 7, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 34

Do you find from a preponderance of the evidence that the continuance of stevedoring operations by Texports Stevedoring Company, Inc., with knowledge of such facts as you may have found in connection with the Special Issue No. 5 was negligence?

To which the Jury answered: "We do."

If you have answered Special Issue No. 34, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 35

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 9, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 36

Do you find from a preponderance of the evidence that the continued use of the beam bridle by Texports Stevedoring Company, Inc., with knowledge of such facts as you may have found in connection with the Special Issue No. 8, was negligence?

To which the Jury made no answer:

* * * * * * *

If you have answered Special Issue No. 36, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 37

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * *

SPECIAL ISSUE NO. 38

Do you find from a preponderance of the evidence that just before the occurrence of the accident made the basis of this suit Mr. Clyde Townsend moved the winch control lever of winch No. 14 into hoist position?

To which the Jury answered: "We do".

* * * * * *

In the event that you have answered Special Issue No. 38 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 39

Do you find from a preponderance of the evidence that such act, if any, was negligence?

To which the Jury answered: "We do not."

* * * * * *

In the event that you have answered Special Issue No. 39 "We do" and only in that event, then answer:

SPECIAL ISSUE NO. 40

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * *

If you have answered Special Issue No. 39, "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 41

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * *

SPECIAL ISSUE NO. 42

Do you find from a preponderance of the evidence that just before the accident made the basis of this suit Clyde Townsend knew or in the exercise of ordinary care should have known that the port winch was equipped with an "on" and "off" switch?

To which the Jury answered: "We do."

* * * * * *

If you have answered Special Issue No. 42, "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 43

Do you find from a preponderance of the evidence that just before the accident made the basis of this suit, Clyde Townsend left his winch without cutting off such switch?

To which the Jury answered: "We do."

* * * * * *

If you have answered Special Issue No. 43, "We do" and only in that event, then answer:

SPECIAL ISSUE NO. 44

Do you find from a preponderance of the evidence that such act, if any, was negligence?

To which the Jury answered: "We do not."

* * * * * *

If you have answered Special Issue No. 44, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 45

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * * *

SPECIAL ISSUE NO. 46

Do you find from a preponderance of the evidence that just before the accident made the basis of this suit Mr. Clyde Townsend failed to make such use of the foot brake on the port winch as would have been made by a person of ordinary prudence in the exercise of ordinary care under the same or similar circumstances?

To which the Jury answered: "We do."

If you have answered Special Issue No. 46, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 47

Do you find from a preponderance of the evidence that such failure, if any, was negligence?

To which the Jury answered: "We do not."

* * * * * * *

If you have answered Special Issue No. 47, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 48

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * * *

If you have answered Special Issue No. 2, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 49

Do you find from a preponderance of the evidence that the port winch at the forward end of the No. 5 hatch was defective, if you have so found, when the winch was turned over to the longshore gang to be used in the loading operations on May 26, 1957?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 29 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 50

Do you find from a preponderance of the evidence that the Defendant knew, or in the exercise of ordinary care should have known, of the defective condition, if any, of the port winch prior to the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 50, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 51

Do you find from a preponderance of the evidence that the Defendant knew, or in the exercise of ordinary care should have known of the defective condition, if any, of the port winch for a sufficient period of time prior to the accident made the basis of this suit for repairs to be made?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 51, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 52

Do you find from a preponderance of the evidence that the fact that the Defendant did not make repairs to the port winch was negligence?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 52, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 53

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 50, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 54

Do you find from a preponderance of the evidence that the Defendant permitted the loading operations to continue after it knew, or in the exercise of ordinary care should have known, of the defective condition, if any, of the port winch?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 54, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 55

Do you find from a preponderance of the evidence that such act, if any, was negligence?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 55 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 56

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 3, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 57

Do you find from a preponderance of the evidence that the Defendant failed to supply Roland Vassallo with a reasonably safe place in which to work, if you have so found, when the longshore gang came aboard the vessel to begin loading operations?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 7, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 58

Do you find from a preponderance of the evidence that the Defendant knew, or in the exercise of ordinary care should have known, that the place supplied Roland Vassallo was not a reasonably safe place in which to work, if you have so found, prior to the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 58 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 59

Do you find from a preponderance of the evidence that the Defendant failed to use that degree of care which a reasonably prudent person would have used in the exer-

cise of ordinary care to make the place supplied to Roland Vassallo a reasonably safe place in which to work after it knew, or in the exercise of ordinary care should have known, that the place supplied to Roland Vassallo was not a reasonably safe place in which to work, if you have so found?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 59, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 60

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 58, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 61

Do you find from a preponderance of the evidence that the Defendant permitted the loading operations to continue after it knew, or in the exercise of ordinary care should have known, that the place supplied to Roland Vassallo was not a reasonably safe place in which to work, if you have so found?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 61, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 62

Do you find from a preponderance of the evidence that such act, if any, was negligence?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 62 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 63

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident in question?

To which the Jury answered: "We do."

* * * * * * *

If you have answered Special Issue No. 9, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 64

Do you find from a preponderance of the evidence that the beam bridle furnished to such workers as Roland Vassallo to be used in unhooking the bridle from the beam was not reasonably safe, if you have so found, when the bridle was turned over to the longshore gang?

To which the Jury made no answer.

* * * * * * *

If you have answered Special Issue No. 9, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 65

Do you find from a preponderance of the evidence that the Defendant knew, or in the exercise of ordinary care should have known, that the beam bridle furnished to such workers as Roland Vassallo to be used in unhooking the bridle from the beam was not reasonably safe, if you have so found, prior to the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * * *

If you have answered Special Issue No. 65, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 66

Do you find from a preponderance of the evidence that the Defendant knew, or in the exercise of ordinary care should have known that the beam bridle furnished to such workers as Roland Vassallo to be used in unhooking the bridle from the beam was not reasonably safe, if you have so found, for a sufficient period of time prior to the accident made the basis of this suit, for repairs to be made?

To which the Jury made no answer.

* * * * * * *

If you have answered Special Issue No. 66, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 67

Do you find from a preponderance of the evidence that the fact that the Defendant did not make repairs to the beam bridle was negligence?

To which the Jury made no answer:

* * * * * * *

If you have answered Special Issue No. 67 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 68

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis of this suit?

To which the Jury made no answer.

* * * * * * *

If you have answered Special Issue No. 65, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 69

Do you find from a preponderance of the evidence that the Defendant permitted the use of the beam bridle after it knew, or in the exercise of ordinary care should have known, that the beam bridle furnished to such workers as Roland Vassallo to be used in unhooking the bridle from the beam was not reasonaly safe, if you have so found?

To which the Jury made no answer.

* * * * * * *

If you have answered Special Issue No. 69, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 70

Do you find from a preponderance of the evidence that such act, if any, was negligence?

To which the Jury made no answer.

* * * * * * *

If you have answered Special Issue No. 70, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 71

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the accident made the basis for this suit?

To which the Jury made no answer.

* * * * * * *

SPECIAL ISSUE NO. 72

Do you find from a preponderance of the evidence that the fatal injuries sustained by Mr. Roland Vassallo were the result of an unavoidable accident as that term is herein defined for you?

To which the Jury answered: "It was not the result of an unavoidable accident".

By the term "unavoidable accident" as used in this issue, is meant the unforeseen and unanticipated happening of an event, occurring without either the Plaintiff, Mr. Roland Vassallo, or the Defendant, Holland-America Line, or its agents, being; guilty of negligence in the doing or permitting to be done, or omitting to be done, anything that proximately caused the accident.

* * * * * * *

SPECIAL ISSUE NO. 73

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Plaintiffs; Mrs. Connie Vassallo, Roland Charles Vassallo and Natalie Vassallo for their pecuniary loss, if any, they have sustained as a result of the death of their husband and father, Roland Vassallo, taking into consideration the following elements of damages and none other:

(a) The present cash value of the pecuniary benefits, if any, that Roland Vassallo would have in reasonable probability given and rendered to his wife, Connie Vassallo, during the balance of his life but for the accident made the basis of this suit;

(b) The present cash value of the pecuniary benefits, if any, which in reasonable probability Roland Vassallo would have given and rendered to his children, Roland Charles Vassallo and Natalie Vassallo during their minority, and for such time thereafter as you find from a preponderance of the evidence that said minors would in reasonable probability have received pecuniary benefits from their father but for the accident made the basis of this suit.

By the term "pecuniary benefits" in its legal signification is meant not only money but anything that can be valued in money.

In the case of the widow, Mrs. Connie Vassallo, pecuniary benefits include not only money for food, shelter and cloth-

ing, but the reasonable pecuniary value of counsel, protection, advices and services around the house, if any, that you may find from a preponderance of the evidence she might have received from her husband Roland Vassallo had he lived.

In the case of the minor children pecuniary benefits include not only money spent for their food, shelter and clothing but also includes the reasonable pecuniary value for nurture and care, if any, you find from a preponderance of the evidence said children would have received from their father from the date of his death during the minority of each of them, and for such time thereafter as you may find from a preponderance of the evidence that they, or either of them, would in reasonable probability have received pecuniary benefits from their father but for the accident made the basis of this suit.

You will not allow Plaintiffs anything for any grief or sorrow on account of the death of the deceased, or for the loss of his society, affection and companionship.

Answer by stating the total amount, if any, that you may find, in dollars and cents, and then apportion such amounts, if any, between the wife and children of Roland Vassallo in the proportions that you may find from a preponderance of the evidence to be just and proper.

To which the Jury answered:

Total amount: One Hundred Thirty-five Thousand Five Hundred Dollars ($135,500.00).

To Connie Vassallo: Eighty-nine Thousand Six Hundred Dollars ($89,600.00).

To Roland Charles Vassallo: Twenty-eight Thousand Five Hundred Fifty Dollars ($28,550.00).

To Natalie Vassallo: Seventeen Thousand Three Hundred Fifty Dollars ($17,350.00).

* * * * * *

SPECIAL ISSUE NO. 74

That sum of money, if any, would fairly and reasonably compensate Plaintiffs for the conscious physical pain and suffering, if any, and mental anguish, if any, that you may find from a preponderance of the evidence Roland Vassallo suffered on May 26, 1957, from the time he received his injuries until his death?

To which the Jury answered: Fifteen Thousand Dollars ($15,000.00).

Signed: J. H. DERRICK
Foreman

And the Court having duly received said verdict and having the same ordered filed without objections from any of the parties, and the Court pursuant to the decision of the Supreme Court of Texas, rendered on the 1st day of March, 1961, having considered the verdict of the jury and in accordance with the decision and opinion of the Supreme Court of Texas, is of the opinion that Plaintiffs are entitled to Judgment against the Defendant Nederlandsch-Amerikaansche Stoomvaart-Maatschappij, Holland-America Line in the sum of One Hundred Thirty-five Thousand Five Hundred Dollars ($135,500.00) for compensatory damages less five per cent, amounting to One Hundred Twenty-eight Thousand Seven Hundred Twenty-five Dollars ($128,725.00) plus the stipulated amount for the funeral expenses in the sum of One Thousand Six Hundred Seventy Dollars ($1,670.00), less five per cent (5%) amounting to One Thousand Five Hundred Eighty-six and 50/100 Dollars ($1,586.50) and that the estate of Roland Vassallo, Deceased, is entitled to judgment in the sum of Fifteen Thousand Dollars ($15,000.00) for paid and suffering sustained by the said Roland Vassallo from the time of his injury until he died, less five per cent (5%) of such amounts

as found by the Jury in response to Special Issue No. 29, making a total amount in the sum of One Hundred Forty-four Thousand Five Hundred Sixty-one and 50/100 Dollars ($144,561.50).

And it further appearing to the court that the Jury has apportioned said damages as follows:

TO CONNIE VASSALLO the sum of Eighty-nine Thousand Six Hundred Dollars ($89,600.00) less five per cent (5%) amounting to Eighty-five Thousand One Hundred Twenty Dollars ($85,120.00) plus One Thousand Five Hundred Eighty-six and 50/100 Dollars ($1,586.50), funeral expenses amounting to	$86,706.50;
TO ROLAND CHARLES VASSALLO the sum of Twenty-eight Thousand Five Hundred Fifty Dollars ($28,550.00) less five per cent (5%) amounting to Twenty-seven Thousand One Hundred Twenty-two and 50/100 Dollars	27,122.50;
TO NATALIE VASSALLO the sum of Seventeen Thousand Three Hundred Fifty Dollars ($17,350.00) less five per cent (5%) amounting to Sixteen Thousand Four Hundred Eighty-two and 50/100 Dollars	16,482.50;
And it further appearing to the Court that the estate of Roland Vassallo, Deceased, is entitled to a judgment in the sum of Fifteen Thousand Dollars ($15,000.00) less five per cent (5%) amounting to Fourteen Thousand Two Hundred Fifty Dollars	$14,250.00.

And it further appearing to the Court that Judgment should be entered against the Third Party Plaintiff, Nederlandsch-Amerikaansche Stoomvaart-Maatschappij; Holland America Line, and in favor of the Third Party Defend-

ant, Texports Stevedoring Company, Inc., and Plaintiffs and Third Party Defendant having moved for Judgment, it is, accordingly

ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs do have and recover of and from the Defendant, Nederlandsch-Amerikaansche Stoomvaart-Maatschappij; Holland-America Line, the sums of money hereinabove set out with six per cent (6%) interest from June 26, 1959, the date the original judgment was entered by this Court until paid, as follows:

MRS. CONNIE VASSALLO, the sum of Eighty-six Thousand Seven Hundred Six and 50/100 Dollars. ($86,706.50), plus six per cent interest from the 26th day of June, 1959, until paid;

ROLAND CHARLES VASSALLO, the sum of Twenty-seven Thousand One Hundred Twenty-two and 50/100 Dollars ($27,122.50) plus six per cent (6%) interest from the 26th day of June, 1959 until paid, to be deposited in the registry of this Court by the next friend Mrs. Connie Vassallo for the use and benefit of the Minor, Roland Charles Vassallo and to remain in the registry of the Court until withdrawn in accordance with law;

NATALIE VASSALLO, the sum of Sixteen Thousand Four Hundred Eighty-two and 50/100 Dollars ($16,482.50) plus six per cent (6%) interest from the 26th day of June, 1959 until paid, to be deposited in the registry of this Court by the next friend, Mrs. Connie Vassallo and to remain in the registry of the Court until withdrawn in accordance with law.

IT IS FURTHER,

ORDERED, ADJUDGED AND DECREED by the Court that the estate of Roland Vassallo, Deceased, do have and

recover from the Defendant, Nederlandsch-Amerikaansche Stoomvaart-Maatschappij: Holland-America Line the sum of Fourteen Thousand Two Hundred Fifty Dollars ($14,250.00) plus six per cent (6%) interest from the 26th day of June, 1959, the date on which the original judgment was entered in this Court, until paid. It is further,

ORDERED, ADJUDGED AND DECREED by the Court that Third Party Plaintiff, Nederlandsch-Amerikaansche Stoomvaart-Maatschappij: Holland-America Line take nothing as against the Third Party Defendant, Texports Stevedoring Company, Inc., as to all claims and causes of action asserted against it or which could have been asserted against it herein and that the Third Party Defendant go hence without day. It is further

ORDERED, ADJUDGED AND DECREED by the Court that execution issue within the time and manner provided for by law and as often as necessary to give full effect and force to the Judgment as entered herein by the Court. It is further

ORDERED, ADJUDGED AND DECREED by the Court that all costs in this proceeding be assessed against the Defendant, and Third Party Plaintiff, Nederlandsch-Amerikaansche Stoomvaart-Maatschappij: Holland-America Line.

All facts not herein found by the Jury are here and now found by the Court in support of this Judgment.

To all of which action of the Court, the Defendant and Third Party Plaintiff in open Court duly excepted, and to which Third Party Defendant in open Court duly excepted as to the Court's action on the cause of action between the Plaintiffs and the Defendant, and gave notice of Appeal to

the Court of Civil Appeals for the First Supreme Judicial District sitting at Houston, Texas.

Done and entered this the 20th day of September, 1961.

/s/ JOHN SNELL, JR.
JUDGE

APPROVED AS TO FORM:

FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI

By /s/ S. G. KOLIUS
Attorney for Defendant, Nederlandsch-Amerikaansche Stoomvaart-Maatschappij; Holland-America Line

ROYSTON, RAYZOR & COOK

By /s/ E. D. VICKERY
Attorneys for Third Party Defendant, Texports Stevedoring Company

MANDELL & WRIGHT

By /s/ ARTHUR J. MANDELL
Attorneys for Plaintiffs, Connie Vassallo, Roland Vassallo and Natalie Vassallo, minors

APPENDIX B

DEFENDANT'S FOURTH AMENDED ORIGINAL ANSWER AND THIRD PARTY ACTION

(Raising the Federal Question Presented)

DEFENDANT'S FOURTH AMENDED ORIGINAL ANSWER AND THIRD PARTY ACTION. FILED: April 7, 1959. R. J. LINDLEY, Clerk District Court, Harris County, Texas. By H. Bleyl, Deputy.

NO. 487,017

MRS. CONNIE VASSALLO, ET AL VS. NEDERL-AMERIK STOOMV MAATS HOLLAND, ET AL	In the District Court of Harris County, Texas 80th Judicial District

DEFENDANT'S FOURTH AMENDED ORIGINAL ANSWER AND THIRD PARTY ACTION

To the Honorable Judge of Said Court:

COMES NOW Holland America Line, sued herein as Nederl-Amerik Stoomv Matts Holland, defendant in the above entitled and numbered cause and with leave of Court first had and obtained files this its fourth amended original answer and for such would respectfully show:

I.

Defendant denies each and every allegation contained in plaintiffs' petition and upon a trial hereof will demand strict proof of same.

II.

Defendant says that the accident made the basis of this suit and plaintiffs' damages were proximately caused by

the negligence of Rolland Vassallo, deceased, in some one or more of the following particulars:

1. In failing to keep such a lookout for his own safety as would have been kept by a person of ordinary prudence in the exercise of ordinary care, under the same or similar circumstances.

2. In placing his hand between the beam bridle chain and the beam at a time when the winches were still being used to manipulate the beam;

3. In failing to wait until the winches had finished manipulating the beam before putting his hand between the beam bridle chain and the beam.

4. In calling for a movement to be made by one of the winches attached to the beam, at a time when his hand was between the beam bridle chain and the beam.

5. In not removing his hand from between the beam bridle chain and the beam before calling for movement to be made by one of the winches attached to the beam.

6. In giving signals to the winch operator when he was not the regularly designated signalman.

7. In violating Rule 22 of the Marine Safety Council Rules, which reads as follows:

"Slinging uploads: — In slinging up a load, your hands should not be in a position to be caught by a sling or bridles."

In violating Rule 24 of the Marine Safety Council Rules, which reads as follows:

"Caution — Stand from under the load; workmen should keep clear of loads being lowered or hoisted."

8. In putting his body in a position to suffer injuries should his signal to the winchman be misunderstood, or not obeyed.

9. In failing to use that degree of care for his own safety that would have been used by a person of ordinary prudence in the exercise of ordinary care under the same or similar circumstances.

10. In assuming the risk and hazards surrounding or growing out of the work aboard the SS EEMDYK just prior to and at the time of the occurrence in question which were open and obvious and as well known to Roland Vassallo as to defendant.

11. In voluntarily exposing himself to a known danger of bodily harm and thus assuming the risk of bodily injury and conducting himself in such fashion as to invoke the application of the doctrine of volenti non fit injuria.

12. Defendant Holland America Line sincerely believes and alleges that the winch in question was in good running order at all times material hereto. Plaintiffs have alleged that such winch was not in good running order from the morning of May 26, 1957, continuously up until the time that this accident occurred. In the alternative, and expressly denying that defendant was negligent in any respect or that the SS EEMDYK was unseaworthy in any respect, defendant says that if the winch was not in good running order that Roland Vassallo, an employee of Texports Stevedoring Company, Inc., had full knowledge of the condition of said winch and failed to exercise that degree of care which a reasonably prudent person would have exercised for his own safety in continuing to use and work with said winch.

That each and all of the foregoing acts, both of commission and omission were negligence and constitute negligence and were each and all a proximate cause of the accident made the basis of this suit and of plaintiffs' damages.

III.

Defendant says that at the time and on the occurrence in question Roland Vassallo was not engaged in a task historically performed by a seaman.

IV.

In the alternative, defendant says that the damages, if any, sustained by plaintiffs were the result of an accident and that such accident was unavoidable.

WHEREFORE, premises considered defendant prays that plaintiffs take nothing herein and that this defendant recover its costs of Court in this behalf expended and for such other and further relief to which it may be justly entitled.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI

By: /s/ S. G. KOLIUS

Attorneys for Defendant
Bank of the Southwest Building
Houston 2, Texas

THIRD PARTY ACTION

NOW becoming actor herein, with leave of Court first had and obtained, Holland America Line, defendant herein, hereinafter called third party plaintiff, files this its second amended third party action complaining of the Texports Stevedoring Company, Inc., a corporation, hereinafter called third party defendant and for such cause of action would respectfully show:

I.

Third party plaintiff is a foreign corporation, having an office and place of business in the State of Texas, and in Harris County. Third party defendant, the Texports Stevedoring Company, Inc., is a corporation duly and legally incorporated under and by virtue of law. It maintains office and place of business in the city of Houston, Harris County, Texas, and more particularly in the Cotton Exchange Building in Houston, Texas, at which place service of process herein may be had.

II.

Plaintiffs have alleged in substance in their amended petition that they are the widow and surviving children of Roland Vassallo, deceased, who was working aboard the SS EEMDYK on or about the 26th day of May, 1957, in Galveston Harbor, and while working on the main deck of said vessel sustained injuries which resulted in his death, causing damages to plaintiffs in the total sum of $201,500.00. Reference is hereby made to plaintiffs' amended petition for its full contents, tenor and effects, with the same force and effect as if a copy thereof were attached hereto entitled "Exhibit A".

III.

On or before the 26th day of May, 1957, Holland America Line contracted with the Texports Stevedoring Company,

Inc., to load cargo aboard the SS EEMDYK and such vessel was made available to the Texports Stevedoring Company, Inc., so that it would fulfill its obligations under such contract. At the time the vessel was in good condition and said vessel and cargo gear aboard such vessel was used by the Texports Stevedoring Company, Inc., and its employees without complaint as to its adequacy or condition. The Texports Stevedoring Company, Inc., third party defendant herein, was obligated to Holland America Line, third party plaintiff herein, to perform its work of loading cargo aboard the SS EEMDYK in a safe and workmanlike manner.

IV.

Holland America Line would show that at all times material hereto the Texports Stevedoring Company, Inc., was an independent stevedoring contractor and was the employer of Roland Vassallo and his co-workers, who were engaged in loading the SS EEMDYK.

V.

Holland America Line has denied and still denies that the death of Roland Vassallo was proximately caused by any unseaworthy condition aboard the SS EEMDYK, but in the alternative, Holland America Line says that if Roland Vassallo, deceased, sustained injuries proximately caused by any unseaworthy condition aboard the SS EEMDYK, which is does not admit to have existed, then Holland America Line alleges that such condition resulted from negligence on the part of the Texports Stevedoring Company, Inc., through its agents, servants and employees, acting within the course and scope of their employment, in one or more of the particulars alleged in Paragraph VI hereof.

VI.

Holland America Line says that if Roland Vassallo, deceased, sustained any injuries and damages as a result of negligence other than his own, then such negligence was that of the Texports Stevedoring Company, Inc., acting by and through its agents, servants or employees, acting in the course and scope of their employment in some one or more of the following particulars:

1. In failing to instruct Roland Vassallo and the gang of which he was a member to perform their work in a safe manner and in accordance with the Marine Safety Council Safety Rules.
2. In failing to perform all stevedoring work aboard the SS EEMDYK in accordance with the Marine Safety Council Rules.
3. In performing stevedoring work aboard the SS EEMDYK in a manner not sanctioned by the Marine Safety Council Rules.
4. In permitting the winch operator to take signals or orders from more than one person.
5. In that employees other than the regularly designated signalmen gave signals or orders to the winch operator.
6. In that the winch operator put himself in a position from which he could not perform his duties in safety.
7. In that the winch operator left his winch without cutting off the power.
8. In that the winch operator left his winch while the winch was still running and was connected to the beam in question.
9. In that the winch operator failed to keep a proper lookout before maneuvering the winch.
10. In that the winch operator failed to use that degree of care in the operation of his winch which a reason-

ably prudent person would have used in the exercise of ordinary care under the same or similar circumstances.

11. In failing to keep Roland Vassallo clear of the beam until it had come to rest.

12. In failing to instruct Roland Vassallo not to put his hand between the beam bridle chain and the beam, while the beam bridle chain was still attached to the winch and the winch was on.

13. Defendant Holland America Line sincerely believes and alleges that the winch in question was in good running order at all times material hereto. Plaintiffs have alleged that such winch was not in good running order from the morning of May 26, 1957, continuously up to the time the accident made the basis of this suit occurred. In the alternative, and expressly denying that defendant was negligent in any respect, defendant says that if the winch was not in good running order that the Texports Stevedoring Company, Inc., acting by and through its agents, servants or employees acting in the course and scope of their employment for the Texports Stevedoring Company, Inc., had full knowledge of the condition, if any, and was negligent and unmindful of its duties to Holland America Line in continuing to use and work with said winch.

Third party plaintiff says that each and all of the above and foregoing acts, both of omission and commission were negligence and that each and all were a proximate cause of the accident made the basis of this suit and plaintiffs' damages.

VII.

In the alternative, and without waiver of the foregoing, Holland America Line alleges that the fatal injuries sustained by Roland Vassallo, deceased, were proximately

caused by the failure on the part of the Texports Stevedoring Company, Inc., to perform its contractual obligations to do the stevedoring work aboard the SS EEMDYK in a safe and workmanlike manner.

VIII.

Holland America Line says that if it is liable herein to plaintiffs, which liability is not admitted, but is expressly denied, then same is due to the negligence of the Texports Stevedoring Company, Inc., and/or to a breach by the Texports Stevedoring Company, Inc., of its contractual duties to Holland America Line and by reason thereof the Texports Stevedoring Company, Inc., should be required to indemnify Holland America Line for any damages that it may be required to pay because of the petition filed herein by plaintiffs, including reasonable attorneys' fees and court costs, and disbursements for allrof which it asks recovery against the Texports Stevedoring Company, Inc.

WHEREFORE, Holland America Line prays that process in due form of law may issue against the Texports Stevedoring Company, Inc., requiring it to appear and answer herein and that upon final hearing hereof, it have judgment against the Texports Stevedoring Company, Inc., indemnifying it as aforesaid with interest and costs and for such other and further relief, general and special, at law or in equity to which it may be justly entitled.

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